

1 HONORABLE RICARDO S. MARTINEZ  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

9 CITY OF ISSAQAH, a municipal  
10 corporation,

11 Plaintiff,

12 v.

13 ORA TALUS 90, LLC, a Delaware limited  
liability company; and RESMARK EQUITY  
PARTNERS, LLC, a Delaware limited  
liability company

14 Defendants.

15 ORA TALUS 90, LLC, a Delaware limited  
liability company; and RESMARK EQUITY  
PARTNERS, LLC, a Delaware limited  
liability company,

16 Third-Party plaintiffs,

17 v.

18 TERRA TALUS LLC, a Washington limited  
liability company; ELEMENT  
RESIDENTIAL INC., a Washington  
corporation; JOSHUA FREED, an individual;  
J.R. HAYES & SONS, INC., a Washington  
corporation; and TERRA ASSOCIATES,  
INC., a Washington corporation,

19 Third-Party Defendants.

20 Case No.: 18-cv-00910 RSM

21 **THIRD PARTY COMPLAINT FOR:  
CONTRACTUAL INDEMNITY;  
IMPLIED INDEMNITY; COMMON LAW  
INDEMNITY; AND NEGLIGENT  
DAMAGE TO PROPERTY**

22  
23  
24 AND RELATED COUNTERCLAIMS

1 Defendants and Third-Party Plaintiffs ORA Talus 90, LLC (“ORA Talus”) and Resmark  
2 Equity Partners, LLC (“Resmark”), by their attorneys, for their Third Party Complaint herein,  
3 allege:

4 **JURISDICTION**

5 1. This Court has jurisdiction over this third party complaint pursuant to 28 U.S.C.  
6 §§ 1332(a)(2) and 1337 in that the Court has original jurisdiction over this action and this third  
7 party complaint itself in that they are civil actions between citizens of different states and the  
8 matter in controversy exceeds the sum of \$75,000 exclusive of interest and costs, and in that the  
9 claims in this third party complaint arise out of and are so related to the claims for relief  
10 asserted in the Complaint filed by the City of Issaquah herein (the “Complaint”), that they form  
11 part of the same case or controversy under Article III of the United States Constitution.

12 2. Venue in the Western District of Washington is proper in that this action is  
13 pending in the Western District of Washington and under 28 U.S.C. § 1391(b)(2) in that a  
14 substantial part of the events or omissions giving rise to this third party complaint occurred in  
15 the Western District of Washington and a substantial part of the property that is the subject of  
16 this third party complaint is situated in the Western District of Washington.

17 **PARTIES**

18 3. At all relevant times herein, third-party plaintiffs ORA Talus and Resmark have  
19 been limited liability companies organized under the laws of the State of Delaware and all of  
20 their members are citizens of Delaware, California or Maryland.

21 4. At all relevant times herein, third-party defendant Terra Talus LLC (“Terra  
22 Talus”) has been a limited liability company organized under the laws of the State of  
23 Washington and all of its members are citizens of the State of Washington.

5. At all relevant times herein, third-party defendant Element Residential Inc. (“Element”) has been a corporation organized under the laws of the State of Washington with its principal place of business in the State of Washington. Element is an affiliate of Terra Talus.

6. At all relevant times herein, third-party defendant Joshua Freed (“Freed”) has been an individual domiciled in the State of Washington. Freed is an affiliate of Terra Talus and Element.

7. At all relevant times herein, third-party defendant J.R. Hayes & Sons, Inc. (“J.R. Hayes”) has been a corporation organized under the laws of the State of Washington with its principal place of business in the State of Washington.

8. At all relevant times herein, third-party defendant Terra Associates, Inc. (“Terra”) has been a corporation organized under the laws of the State of Washington with its principal place of business in the State of Washington.

## **GENERAL ALLEGATIONS**

9. This third party complaint arises from the cause of action alleged against ORA Talus and Resmark in the Complaint herein filed by the City of Issaquah, Washington (the “City”). In the Complaint, the City alleges that it is entitled to recover from ORA Talus and Resmark damages the City contends were caused to certain portions of the City’s infrastructure and certain of the City’s water facilities as a result of a 2015 landslide (the “Landslide”) on the property commonly known as Talus Parcel 9. In the Complaint, the City alleges that the foregoing alleged property damage was caused by alleged acts and omissions of ORA Talus and Resmark in breach of alleged duties the City contends were owed by ORA Talus and Resmark to the City. A true and correct copy of the Complaint is annexed hereto as Exhibit A.

10. ORA Talus and Resmark have answered the Complaint. In their answer, ORA Talus and Resmark have denied and continue to deny that any acts or omissions by either of

1 them caused any damage to property of the City or breached duties, if any, either ORA Talus or  
 2 Resmark owed to the City. ORA Talus and Resmark have also asserted counterclaims against  
 3 the City. In their counterclaims, ORA Talus and Resmark allege that, contrary to the allegations  
 4 in the Complaint, the City's own actions and failures to act caused significant loss and damages  
 5 to real property and monetary damages to ORA Talus and Resmark and their subrogated  
 6 insurers and that the City's actions and failures to act caused or, at the least, contributed, in  
 7 whole or in substantial part, to the Landslide. A true and correct copy of ORA Talus's and  
 8 Resmark's Amended Answer to Complaint; and Counterclaims is annexed hereto as Exhibit B.

9       11. If the City in fact suffered any damage to its property and if any such damage  
 10 was proximately caused by acts or omissions of persons or entities other than the City itself,  
 11 directly or through its agents, any such damage was not caused by acts or omissions of ORA  
 12 Talus or Resmark, but rather was proximately caused by the acts or omissions of others,  
 13 including third-party defendants Terra Talus, J.R. Hayes and Terra, as set forth hereinbelow.  
 14 ORA Talus and Resmark bring this third party complaint against said third-party defendants to  
 15 recover from them indemnity for any damages the City is found to have suffered.

16       12. ORA Talus and Resmark also bring this third party complaint, on behalf of  
 17 themselves and their subrogated insurers, to recover for loss and damage to real property and  
 18 monetary damages they and their subrogated insurers incurred by reason of the acts and failures  
 19 to act by the third-party defendants named in this third party complaint to the extent said third-  
 20 party defendants caused or contributed to the loss of real property and damages incurred by  
 21 ORA Talus and Resmark and their subrogated insurers.

22       13. ORA Talus is the current owner of Talus Parcel 9. ORA Talus acquired title to  
 23 Talus Parcel 9 by deed recorded on July 2, 2014.

1       14. Talus Parcel 9 is part of the Talus Master Planned Development in Issaquah,  
 2 Washington. Talus Parcel 9 is located to the west of the intersection of Shangri-La Way NW  
 3 and NW Talus Drive and to the east of the parcel of land commonly known as Talus Parcel 8.  
 4 Shangri-La Way NW is a public right of way that runs along the boundary between Talus Parcel  
 5 9 and Talus Parcel 8.

6       15. In 1998 and 1999, the City caused environmental reviews to be conducted on the  
 7 parcels in the Talus Master Planned Development, which reviews resulted in draft and final  
 8 Environmental Impact Statements and a draft Supplemental Environmental Impact Statement.  
 9 Each of these Environmental Impact Statements recognized that the planned development area  
 10 included landslide hazard areas. In fact, as recognized by the City, Talus Parcel 9, Talus Parcel  
 11 8 and other parcels of land in the planned development area, including that parcel commonly  
 12 referred to as Talus Parcel 7, lie within a mapped deep-seated landslide hazard area.

13       16. In or about December 1999, the City entered into a Development Agreement  
 14 with respect to the Talus Master Planned Development. The Development Agreement, like the  
 15 Environmental Impact Statements, recognized that the planned development included landslide  
 16 hazard areas.

17       17. Prior to the acquisition of Talus Parcel 9 by ORA Talus, Talus Parcel 7, Talus  
 18 Parcel 8 and Talus Parcel 9 were owned by affiliates of J.R. Hayes. Those affiliates submitted  
 19 an application to the City for approval of a preliminary plat for residential lots on Talus Parcel  
 20 7, Talus Parcel 8 and Talus Parcel 9. The application was supported by geotechnical analyses  
 21 (one for each of Talus Parcel 7, Talus Parcel 8 and Talus Parcel 9), each of which was entitled a  
 22 Critical Area Report (“CAR”) and each of which had been prepared in 2014 by Terra.

23       18. None of the CARs acknowledged or recognized that Talus Parcel 7, Talus Parcel  
 24 8 and Talus Parcel 9 lie within a mapped deep-seated landslide.

1       19.     The CAR for Talus Parcel 9 noted that natural geologic conditions encountered  
 2 at Talus Parcel 9 indicated that, with the exception of colluvium deposited in the northern ravine  
 3 area, the slopes have generally been stable during the post-glacial period. The CAR for Talus  
 4 Parcel 9 noted that there was no evidence of unstable slope condition or recent slope instability  
 5 on the parcel.

6       20.    Prior to the acquisition of Talus Parcel 9 by ORA Talus, Element entered into a  
 7 Purchase and Sale Agreement, dated for reference purposes January 23, 2014, as amended as of  
 8 March 7, 2014, April 7, 2014, and April 10, 2014, to acquire Talus Parcel 9.

9       21.    On April 24, 2014, Element entered into an agreement with Terra pursuant to  
 10 which Terra agreed to update its 2008 geotechnical report for Talus Parcel 9. In the agreement,  
 11 Terra noted that it had received authorization from J.R. Hayes to use existing data and soils data  
 12 from supplemental test pits to prepare the report.

13       22.    Pursuant to the agreement with Element, Terra issued a report entitled  
 14 Geotechnical Report Talus Parcel 9 Issaquah, Washington (the “Geotechnical Report”). In the  
 15 Geotechnical Report, Terra noted that there was groundwater seepage in the property of a minor  
 16 to moderate flow, but opined that it was isolated and represented infiltrated rainfall. In the  
 17 Geotechnical Report, Terra noted that, based on the Issaquah Municipal Code definition of  
 18 landslide hazard area, nearly the entire north one-half of the site fell under the landslide hazard  
 19 category, but opined that, as currently planned, the development concept and planned grading  
 20 when completed as Terra recommended in the report, would eliminate the landslide hazard.  
 21 The Geotechnical Report, like the CAR for Talus Parcel 9, failed to mention that the entire site  
 22 was within a mapped deep-seated landslide.

23       23.    The Geotechnical Report represented that it had been prepared in accordance  
 24 with generally accepted geotechnical engineering practices. The Geotechnical Report

1 acknowledged that it was intended for specific application to the Talus Parcel 9 project and that  
 2 its opinions and recommendation were to be implemented and relied upon in the design, grading  
 3 and construction of the project.

4       24. Element and ORA Talus entered into an Assignment and Assumption Purchase  
 5 and Sale Agreement pursuant to which ORA Talus acquired the contractual right of Element to  
 6 purchase Talus Parcel 9 and ORA Talus agreed to engage Element, or one of its builder  
 7 affiliates, as a fee builder of the townhomes to be built on Talus Parcel 9.

8       25. Pursuant to the Assignment and Assumption Purchase and Sale Agreement,  
 9 effective June 30, 2014, ORA Talus engaged Terra Talus as general contractor to perform or  
 10 cause to be performed and be responsible for all of the pre-construction work, land development  
 11 work and all of the phase unit work for the Talus Parcel 9 project (the “Terra Talus  
 12 Agreement”).

13       26. Terra Talus engaged J.R. Hayes as a subcontractor to perform grading and other  
 14 work on Talus Parcel 9 (the “J.R. Hayes Agreement”). The agreement between Terra Talus and  
 15 J.R. Hayes was entered into on April 10, 2014, and refers to Terra Talus or assigns as owner and  
 16 J.R. Hayes as contractor because it was entered into prior to ORA Talus’s acquisition of the title  
 17 to Talus Parcel 9 and prior to ORA Talus’s engagement of Terra Talus as general contractor.

18       27. Pursuant to the Terra Talus Agreement, Terra Talus warranted that it was in  
 19 charge of and responsible for and participated in the preparation of the plans and specifications  
 20 and other contract documents affecting the Talus Parcel 9 project. Pursuant to the Terra Talus  
 21 Agreement, Terra Talus also warranted that it had investigated and would investigate to full  
 22 satisfaction all conditions affecting the work affecting the project which included the  
 23 geotechnical engineering work for which Terra Talus had engaged Terra and obtained the  
 24 Geotechnical Report. These warranties imposed on Terra Talus the responsibility to ensure that

1 the work performed by Terra conformed to the requisite standard of care for such work as the  
2 Geotechnical Report represented it had.

3 28. Pursuant to the Terra Talus Agreement, Terra Talus agreed that it would  
4 supervise, direct, and be fully responsible for the design, architecture, engineering and all work  
5 to be performed on Talus Parcel 9, and be responsible for the acts and omissions of all  
6 consultants (e.g., Terra) and all subcontractors (e.g., J.R. Hayes).

7 29. Pursuant to the Terra Talus Agreement, Terra Talus agreed that it was solely  
8 responsible and liable for executing all work in a safe and prudent manner including protecting  
9 the public from property damage.

10 30. Pursuant to the Terra Talus Agreement, Terra Talus expressly agreed to  
11 indemnify ORA Talus and any of its members, partners and other parties in interest and their  
12 successors and assigns (the “Indemnitees”) and hold the Indemnitees harmless and defend them  
13 from and against any claims, demands, obligations, damages, actions, causes of action, suits,  
14 losses, judgments, awards, fines, penalties, liabilities, costs and expenses (including, without  
15 limitation, attorneys’ fees, disbursements, court costs and all other expert or consultants’ fees  
16 and costs).

17 31. Pursuant to the Terra Talus Agreement, Terra Talus acknowledged that ORA  
18 Talus would not have control over or charge of, and would not be responsible for, design,  
19 construction means, or safety precautions in connection with the work to be performed.

20 32. Third-party defendants Element and Freed executed a written Guaranty in favor  
21 of ORA Talus as of June 30, 2014 (the “Guaranty”). Pursuant to the Guaranty, Element and  
22 Freed, jointly and severally, unconditionally and irrevocably guaranteed for the benefit of ORA  
23 Talus and its successor and assigns the performance of all obligations of Terra Talus with  
24 respect to the foregoing.

1       33. Pursuant to the J.R. Hayes Agreement, J.R. Hayes agreed to perform all  
 2 infrastructure, grading and site work necessary to deliver recordable townhome lots.  
 3 Additionally, pursuant to the J.R. Hayes Agreement, J.R. Hayes agreed that it would provide all  
 4 reasonable protection to prevent damage or loss to property at the site or adjacent thereto.

5       34. In September 2015, construction grading and development began on Talus Parcel  
 6 9 under the direction of Terra Talus, as general contractor, and J.R. Hayes, as the grading  
 7 subcontractor. Terra Talus and J.R. Hayes followed the recommendations made by Terra in the  
 8 Geotechnical Report. Grading to reach proposed elevations consisted of cuts and fill placement  
 9 ranging from approximately 2 to 15 feet. Temporary fills up to 22 feet were installed to allow  
 10 equipment access to install soldier pile and tieback walls at the upper west side of the site.  
 11 These fills were in addition to the fill the City had placed along the south and west sides of  
 12 Talus Parcel 9 as part of an extension of Shangri-La Way.

13       35. As part of the foregoing construction grading begun in September 2015 on Talus  
 14 Parcel 9, surface water was rerouted through unlined drainage swales to three or four temporary  
 15 storm ponds and two previously existing ponds were relocated mid-slope. Two soldier pile  
 16 walls (Power Vault Wall and Wall A) were mostly completed near the top of the slope by the  
 17 end of October 2015. This work too followed the recommendations of Terra in the  
 18 Geotechnical Report.

19       36. On or about October 25, 2015, water seepage at a valve can near the intersection  
 20 of Shangri-La Way and NW Stoney Creek Drive and a City-owned blow-off valve on Talus  
 21 Parcel 9 was reported to J.R. Hayes personnel and subsequently to the City. In response, the  
 22 City shut off a water supply valve near the bridge on Stoney Creek Drive. The blow-off valve  
 23 was then closed and the above ground riser portion was covered with plastic. Upon information  
 24 and belief, these actions were not adequate to stop the water leaking onto Talus Parcel 9.

1       37. On October 31, 2015, water seepage adjacent to the sidewalk in the southwest  
 2 portion of Talus Parcel 9 near the blow-off riser/power vault was noticed by a neighboring  
 3 resident who notified a Talus Parcel 9 representative who, in turn, notified the City. On  
 4 October 31, 2015, subsidence and tension cracks were observed between the Power Vault Wall  
 5 and a sidewalk along Shangri-La Way West and upslope of Talus Parcel 9. On November 1,  
 6 2015, a City employee arrived on site and closed a valve on a water supply line in the  
 7 intersection adjacent to the site.

8       38. By November 5, 2015, gradual changes including uneven sidewalks and cracks  
 9 in the curb and gutter were observed at the toe of the slope in the intersection of Shangri-La  
 10 Way and Talus Drive. On November 9, 2015, new tension cracks were observed behind the  
 11 Power Vault and south end of Wall A.

12       39. On November 12, 2015, excavations at the top of the slope encountered free  
 13 flowing water. J.R. Hayes personnel reported water seepage near a retaining wall in the  
 14 southwest, adjacent to the intersection where several clusters of water supply valves were  
 15 located within the intersection. The City used a leak locating device to listen to the valves and  
 16 determined that one valve was leaking at an estimated rate of several gallons per minute. Upon  
 17 information and belief, the leaking water was City-owned water. On the same day, a leak was  
 18 detected at the top of the slope.

19       40. On November 13, 2015, large volumes of water continued flowing from the  
 20 upper rockery above the intersection at the base of the slope (NW Talus Drive and Shangri-La  
 21 Way NW).

22       41. On November 13, 2015, at the direction of the City, a portion of the road was  
 23 removed and the leaking valve was exposed. The excavation disclosed that the packing gland  
 24

1 nuts on the valve were loose and that there was a constant visible leak. The City and/or an  
 2 agent of the City tightened several nuts and the water leakage slowed.

3 42. On November 13, 2015, larger changes were seen in the intersection of NW  
 4 Talus Drive and Shangri-La Way NW. Further cracking was seen in the asphalt curb and gutter  
 5 as the pavement was uplifted about 12 to 18 inches in the road about 5 feet east of the western  
 6 curb. Movement of retaining walls was observed. The Landslide had occurred. On November  
 7 17, 2015, the City issued a partial stop work order for the Talus Parcel 9 site.

8 43. On January 14, 2016, a test pit was excavated at the top of the slope, east of the  
 9 intersection of Shangri-La Way NW and NW Stoney Creek Drive. This excavation revealed a  
 10 broken 8-inch diameter water main pipe, loose end cap and blow-off valve leak. In the  
 11 Complaint, the City alleges that the damage revealed by the excavation was caused by the  
 12 Landslide. In the Amended Answer and Counterclaims, ORA Talus and Resmark contend that  
 13 the City directly and/or through its agents negligently installed, operated, maintained, serviced,  
 14 repaired and/or tested the water supply lines, pipes and valves in or adjacent to Talus Parcel 9  
 15 and that the City's negligence caused those water supply lines, pipes and valves to allow large  
 16 amounts of water to leak onto Talus Parcel 9 and caused the Landslide because the amounts of  
 17 water that leaked onto Talus Parcel 9 from the City's water supply lines, pipes and valves were  
 18 great enough to saturate the soil on Talus Parcel 9 and impede the ability of the land to handle  
 19 rainfall and other surface or underground water flows and that this destabilized Talus Parcel 9.

20 **FIRST CLAIM FOR RELIEF**

21 **(For Contractual Indemnity Against Terra Talus, Element and Freed)**

22 44. ORA Talus and Resmark repeat and reallege each and every allegation contained  
 23 in paragraphs 1 through 43, inclusive, of this third party complaint with the same force and  
 24 effect as if said allegations were fully repeated and realleged at length herein.

45. If, as alleged in the Complaint, the City suffered any damage to its property and if, as alleged in the Complaint, the City is found to be entitled to recover such damage or any other sums from ORA Talus or Resmark because the damage was proximately caused by acts or omissions in work performed on Talus Parcel 9, then, pursuant to the express indemnity and hold harmless provision in the Terra Talus Agreement, Terra Talus is obligated to defend, indemnify, and hold ORA Talus and Resmark harmless for and from damages, if any, incurred by the City and incurred by ORA Talus or Resmark and all amounts paid by ORA Talus or Resmark by way of defense costs (including attorneys' fees), settlement or judgment.

46. If, as alleged in the Complaint, the City suffered any damage to its property and if, as alleged in the Complaint, the City is found to be entitled to recover such damage or any of the sums from ORA Talus or Resmark because the damage was proximately caused by acts or omissions in work performed on Talus Parcel 9, then, pursuant to the Guaranty, Element and Freed are jointly and severally obligated, along with Terra Talus, to indemnify and hold ORA Talus and Resmark harmless for and defend from damages, if any, incurred by the City, and incurred by ORA Talus or Resmark and all amounts paid by ORA Talus or Resmark by way of defense costs (including attorneys' fees), settlement or judgment.

## **SECOND CLAIM FOR RELIEF**

## **(For Implied Indemnity Against Terra Talus, Element and Freed)**

47. ORA Talus and Resmark repeat and reallege each and every allegation contained in paragraphs 1 through 43, inclusive, of this third party complaint with the same force and effect as if said allegations were fully repeated and realleged at length herein.

48. If, as alleged in the Complaint, the City suffered any damage to its property and if, as alleged in the Complaint, such damage was proximately caused by any acts or omissions in work performed on Talus Parcel 9, any such damage was caused by acts or omissions of

1 Terra Talus in doing or failing to do what the Terra Talus Agreement obligated Terra Talus to  
2 do in connection with its complete responsibility for such work.

3 49. By reason of the foregoing, if the City recovers damages or other sums from  
4 ORA Talus or Resmark for damage to the City's property as alleged in the Complaint, then  
5 ORA Talus and Resmark are entitled to complete indemnity, jointly and severally, from Terra  
6 Talus, Element and Freed for all damages, if any, incurred by the City and all damages incurred  
7 by ORA Talus or Resmark and all amounts paid by ORA Talus or Resmark by way of defense  
8 costs (including attorneys' fees), settlement or judgment.

9 **THIRD CLAIM FOR RELIEF**

10 **(For Common Law Indemnity Against Terra Talus, J.R. Hayes and Terra)**

11 50. ORA Talus and Resmark repeat and reallege each and every allegation contained  
12 in paragraphs 1 through 43, inclusive, of this third party complaint with the same force and  
13 effect as if said allegations were fully repeated and realleged at length herein.

14 51. As Terra Talus, J.R. Hayes and Terra knew, or should have known, fill placed on  
15 top of a known landslide hazard area is a known contributor to instability. Terra Talus, J.R.  
16 Hayes and Terra knew, or should have known, prior to recommending how to do grading work  
17 and prior to commencing grading work on Talus Parcel 9 that the City previously had caused  
18 fill to be placed along the south and west sides of Talus Parcel 9 and that the additional fill  
19 placed on Talus Parcel 9 would increase instability of the parcel.

20 52. If, as alleged in the Complaint, the City suffered any damage to its property and  
21 if, as alleged in the Complaint, such damage was proximately caused by any acts or omissions  
22 in work performed on Talus Parcel 9, any such damage was caused, in whole or in part, by acts  
23 or omissions of Terra Talus, J.R. Hayes and Terra in doing and failing to do what was necessary  
24 to protect Talus Parcel 9 and adjacent property.

53. By reason of the foregoing, if the City recovers any damages or other sums from ORA Talus or Resmark for damages to the City's property as alleged in the Complaint, then ORA Talus and Resmark are entitled to common law indemnity from Terra Talus, J.R. Hayes and Terra for all damages, if any, incurred by the City and all damages incurred by ORA Talus or Resmark and all amounts paid by ORA Talus or Resmark by way of defense costs (including attorneys' fees), settlement or judgment.

## **FOURTH CLAIM FOR RELIEF**

**(For Negligent Damage to Real Property Against Terra Talus, J.R. Hayes and Terra)**

54. ORA Talus and Resmark repeat and reallege each and every allegation contained in paragraphs 1 through 43, inclusive, and 51 of this third party complaint with the same force and effect as if said allegations were fully repeated and realleged at length herein.

55. Each of Terra Talus, J.R. Hayes and Terra caused loss and damage to real property (*i.e.*, Talus Parcel 9) and monetary damages to ORA Talus and Resmark and their subrogated insurers by reason of the actions and failure to act as alleged herein.

56. The fill placed on Talus Parcel 9 during the construction grading and development begun in September 2015, in addition to the fill placed on Talus Parcel 9 by the City, exacerbated the destabilization of Talus Parcel 9 caused by the leaking of City-owned water onto Talus Parcel 9 and was a contributing cause of the Landslide.

57. The redirection of the flow of surface water through unlined drainage swales and stored in unlined storage ponds during the construction, grading and development begun in September 2015, also contributed to the destabilization of Talus Parcel 9 and was a contributing cause of the Landslide.

58. The failure to control runoff from Shangri-La Way at the head of Talus Parcel 9 during the construction, grading and development begun in September 2015, which allowed the

1 runoff to flow onto Talus Parcel 9, contributed to the destabilization of Talus Parcel 9 and was a  
 2 contributing cause of the Landslide.

3       59.     The fill changes and the rerouting of the surface water were part of Terra's  
 4 recommendations for the design, grading and construction of Talus Parcel 9 in the Geotechnical  
 5 Report and supported Terra's opinion that, if followed, they would eliminate the landslide  
 6 hazard caused, Terra said, by the steep slopes on Talus Parcel 9. J.R. Hayes, as the grading  
 7 subcontractor, and Terra Talus, as general contractor, followed Terra's recommendations.  
 8 Contrary to Terra's opinion, the Landslide did happen.

9       60.     The recommendations in the Geotechnical Report were based on borings and test  
 10 pits Terra performed in connection with the CAR for Talus Parcel 9 and the Geotechnical  
 11 Report in order to analyze soil conditions and groundwater presence on, and overall stability of,  
 12 Talus Parcel 9. However, the borings were shallow and spatially limited.

13       61.     The conclusions in the Geotechnical Report regarding groundwater presence  
 14 dismissed all groundwater presence as being the result of rainfall and did not recognize that the  
 15 groundwater could have, and likely did, come from other sources which could and did have an  
 16 effect on the stability of Talus Parcel 9.

17       62.     The conclusions in the Geotechnical Report regarding the landslide risks on  
 18 Talus Parcel 9 attributed the risk to the steep slopes because the Issaquah Municipal Code  
 19 included steep slopes within the definition of landslide hazard. In doing this, Terra did not give  
 20 sufficient consideration to other risks of a landslide (leaking water, water runoff and excessive  
 21 fill) and led Terra to its expressed opinion that the grading and development design  
 22 recommended by Terra would eliminate the landslide hazard. The Landslide evidences the  
 23 inadequacy of Terra's testing and resulting evaluations and opinions.

1       63.     The testing, analyses, evaluations and opinions for and in the Geotechnical  
 2 Report were performed and rendered by Terra as a geotechnical engineer. As a geotechnical  
 3 engineer with admitted knowledge that the Geotechnical Report was to be relied upon in the  
 4 design, grading and construction of the Talus Parcel 9 project, Terra assumed the duty to ORA  
 5 Talus and Resmark to use reasonable engineering skill and judgment and to act with reasonable  
 6 care to avoid creating risks to the safety of persons and property and causing physical damage to  
 7 the Talus Parcel 9 real property.

8       64.     The acts and omissions of Terra in the performance of its work and the  
 9 evaluations and opinion it rendered were negligently performed and rendered in that they were  
 10 not performed or rendered with the required reasonable skill and judgment and required  
 11 reasonable care and, therefore, Terra breached the duty it had assumed and owed to ORA Talus  
 12 and Resmark.

13       65.     As licensed contractors, Terra Talus and J.R. Hayes should have recognized that  
 14 the recommendations and opinions of Terra were inadequate and that, if followed by Terra  
 15 Talus and J.R. Hayes, they would create risks to the safety of persons and property, including  
 16 Talus Parcel 9, and adjacent property, thereby breaching their own duty of care.

17       66.     Terra Talus and J.R. Hayes accepted and followed the recommendations and  
 18 opinions of Terra and, therefore, breached their own duty of care.

19       67.     Additionally, Terra Talus expressly undertook the responsibility to ensure that  
 20 the work performed by Terra conformed to the requisite standard of care for such work and  
 21 expressly assumed responsibility for the work performed by J.R. Hayes.

22       68.     By reason of the breaches of duty by Terra, J.R Hayes and Terra Talus, ORA  
 23 Talus and Resmark and their subrogated insurers have incurred loss and damage to real property  
 24 and millions of dollars in damages including, but not limited to, the costs or the work on Talus

Parcel 9 prior to the Landslide that was lost by the Landslide, the costs of stabilizing and monitoring Talus Parcel 9 after the Landslide and the costs of remediating Talus Parcel 9 to bring it back to its pre-Landslide developable condition. ORA Talus and Resmark estimate that these damages alone exceed \$35,000,000.

69. ORA Talus and Resmark also estimate that they and their subrogated insurers have incurred and will continue to incur additional damages, the amount of which will be determined at trial.

70. By reason of the foregoing, ORA Talus and Resmark are entitled to recover from Terra Talus, J.R. Hayes and Terra all damages incurred by them and their subrogated insurers.

## PRAAYER

WHEREFORE, ORA Talus and Resmark pray that judgment be entered herein as follows:

1. Adjudging and decreeing that third party defendants Terra Talus, Element and Freed are contractually obligated, jointly and severally, to defend, indemnify, and hold third-party plaintiffs ORA Talus and Resmark harmless for and from all damages, if any, incurred by the City and all damages incurred by ORA Talus or Resmark and all amounts paid by ORA Talus or Resmark by way of defense costs (including attorneys' fees), settlement or judgment;

2. Adjudging and decreeing that third party defendants Terra Talus, Element and Freed are liable and obligated, jointly and severally, in implied indemnity to indemnify third-party plaintiffs ORA Talus and Resmark for all damages, if any, incurred by the City and all damages incurred by ORA Talus or Resmark and all amounts paid by ORA Talus or Resmark by way of defense costs (including attorneys' fees), settlement or judgment;

3. Adjudging and decreeing that third party defendants Terra Talus, J.R. Hayes and Terra are liable and obligated in common law indemnity to indemnify third-party plaintiffs

1 ORA Talus and Resmark for all damages, if any, incurred by the City and all damages incurred  
2 by ORA Talus or Resmark and all amounts paid by ORA Talus or Resmark by way of defense  
3 costs (including attorneys' fees), settlement or judgment;

4 4. Awarding to third-party plaintiffs ORA Talus and Resmark, for themselves and  
5 their subrogated insurers, and ordering third party defendants Terra Talus, J.R. Hayes and Terra  
6 to pay ORA Talus and Resmark, compensatory damages in the amount determined at trial; and

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5. Awarding to ORA Talus and Resmark, for themselves and their subrogated insurers, such other and further relief as to this Court may seem just and proper.

DATED this 1st day of October, 2018.

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LLC

**CERTIFICATE OF SERVICE**

I hereby certify that on October 1, 2018 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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